BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	
[redacted]	)	NO.: 99-22
	)	DUE PROCESS HEARING

FINAL ORDER

Jack E. Seaman
Administrative Law Judge
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. No. 4058
September 6, 2000

FINAL ORDER

This case was initiated by a Due Process Hearing Request subsequent to an IEP Team meeting on February 18, 1999. The IEP Team consisted of ten individuals - five representatives from the County school system, two from a State mental health facility, one from the behavioral health organization responsible for the student's mental health services, a psychiatrist hired by the BHO to evaluate the student and make recommendations, and the single mother.[1] Also in attendance was a court reporter who made a stenographic recording of the meeting.

Issue

The main issue for determination is whether the parent is entitled to reimbursement from the school system for costs related to the placement of the student at the Devereaux Program in Pennsylvania. The student was placed at the Devereaux Program by the parent, without recommendation or referral by the school system, under a contract with Premier to pay for the placement and the parent to pursue the Due Process remedy seeking reimbursement which would be paid to Premier.

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[1]The State mental health facility is Middle Tennessee Mental Health Institute, Tennessee Department of Mental Health and Mental Retardation, hereinafter referred to as MTMHI. The behavioral health organization is Premier Behavioral Health (Premier Behavioral Systems of Tennessee, LLC) hereinafter "Premier" which is the TennCare BHO responsible for this student's mental health services.

Also considered is whether the party seeking the Due process Hearing had standing to make the request.

Background

The student in this case was born in February of 1983 and began receiving special education services in preschool at age four. In grades Kindergarten through eight the student was enrolled in the City special school district schools, performed reasonably well academically, but had been absent for varying periods beginning mid-fifth grade as a result of some eighteen hospitalizations or admissions initiated by the parent typically because of acute depression, anger, violence and suicidal ideations. The student was eligible to attend the County school system in the ninth grade, school year 1998-1999, but never attended any County system school. The student was admitted, for the second time, to MTMHI on August 11, 1998 and had been discharged mid-June, 1999 to begin the placement at Devereaux in Pennsylvania. The student had varying diagnoses over the years, mostly in the pervasive development disorder area, and his current diagnosis was Asperger's Syndrome. Manifestation of this syndrome includes difficulty with peer interaction. It is sometimes referred to as a mild form of autism.

In 1997 the student, by his mother, and the mother individually, filed a civil suit in State court against Premier and First Hospital Corporation. The allegations in the suit are unknown to the Administrative Law Judge. The information regarding

the suit was made known in this Due Process proceeding because legal representation provided the parent in the Due Process proceeding is by an attorney in the same law firm providing representation for Premier in the suit by the parent and on behalf of the student against Premier. Also, the question has been presented as to whether Premier is the real party in interest in this proceeding.

Premier selected and paid a child psychiatrist at Vanderbilt University to perform a psychiatric evaluation on the student which was performed on November 5, 1998. The report, revised in December of 1998, states "In order to make recommendations regarding level of care, I have reviewed the provider manual of Premier Behavioral Systems of Tennessee." The report also notes that the student has "limited insight into his condition" and realizes that he did not relate as easily as others to his peers and considered that "a big problem". The report also notes that the student "feels a solution is to return home and live with his mother, even though he and his mother had a very difficult relationship." The report concludes with a recommendation that the student be placed in a residential program like Devereaux.

In January 1999, the attorney for Premier contacted the County school system to advise them of the residential placement recommendation by the psychiatrist and to request the County school system to pay a portion of the placement cost. The report of the psychiatrist was provided the school system and the school system

declined the request on behalf of Premier for contribution. Counsel for Premier then requested the IEP Team meeting which was held on February 18, 1999. It is apparent that prior to the IEP Team meeting the school concluded it would offer a program at the local school facility and not agree to the Devereaux residential placement and, also, that a determination was made by or for the mother that the student would be placed at the Devereaux Program in Pennsylvania. Following the IEP Team meeting where no consensus was reached, the mother and Premier entered into a contract whereby Premier would pay for the Devereaux placement and the mother would pursue the Due Process proceedings with counsel selected by Premier and at the direction of Premier in an effort to obtain reimbursement which would be paid to Premier.

The IEP Team Meeting February 18, 1999

The transcript of the February 18, 1999 IEP Team meeting discloses much courteous discussion about the student and his problems in the beginning. The mother stated it was discouraging to her "because you know I'd love [for the student to be] at home going to [the local school district]." The mother stated the student and she continued to have a "more harmonious relationship" and she thought he was "developing and learning to express feelings, needs, etc." and he wasn't as explosive and violent or as threatening to her anymore. An MTMHI representative said they had been recommending a residential placement for a long time. The psychiatrist said the problem which required residential placement

was that the conflict between the student and his mother would derail him if he went home. The mother stated her son had been talking to her about a G.E.D. but had said he did not want a G.E.D.: "No. I want my diploma. I want to go through the whole thing, and I want my diploma."

About halfway through the IEP Team meeting the MTMHI school director for the in-patient program remarked that the school personnel were talking about a day program for the student when the clinical recommendation was for a residential specific disorder treatment program and commented that "We're not going to get anywhere" unless they were all considering a residential program. The school system indicated they were only addressing the educational issue and that there had been communication with the attorney for Premier which led to the statement by the representative of Premier that Premier would provide whatever was appropriate at a day program and living at home or in a residential placement but "we would certainly support the recommendation that Middle has and [the psychiatrist] has of a residential educational placement." This was even though the psychiatrist had not made a recommendation of an educational placement. An MTMHI representative addressed Premier asking what it would take for them to pay for the residential placement. Thereafter, it developed through conversation and input by the Premier representative, the psychiatrist Premier had do the evaluation of the student, and from MTMHI representatives that the student had been accepted at the Devereux program in Pennsylvania and Premier was trying to

determine if the school system would pay a portion of the cost. The school offered to go over the "shell of the IEP" that had been written to that point and talk about what they would try to offer, take input from the group, etc., but stated the school IEP Team would not agree to a residential placement. Nothing further was done with the shell IEP and no one signed it during the meeting.

The Due Process Hearing

The testimony of some of the witnesses and exhibits will be summarized. There were other witnesses and numerous exhibits introduced at the hearing and all of them were considered.

The psychiatrist testified he had been asked to see this student as a consultant to his insurance company to do psychiatric evaluation and make recommendations for treatment. His report states "In order to make recommendations regarding level of care, i have reviewed the provider manual of Premier Behavioral Systems of Tennessee." His evaluation included a two hour meeting with the mother, a one and one-half hour meeting with the student, a two minute observation of the student with peers at MTMHI, a review of previous admission records, no review of any educational materials or any proposed school program and no review or discussion with any educational officials. The doctor was familiar with some twenty admissions to two different programs from 1993 until the present time, mostly acute hospitalizations and one residential treatment program. Most of the admissions were for depressive illness or a

conduct disorder usually called PDD, Pervasive Developmental Disorder, which includes Asperger's.

When the doctor was asked what you did for a child with Asperger's, his reply was

> "Children like this need a comprehensive treatment approach and it needs to be comprehensive in the sense that the child's experience at home needs to be coordinated with school and with other activities that he may have during the day.
>
> "There usually needs to be a therapist involved who can help coordinate what happens in these different areas. . . .
>
> "Sometimes children like this need medication for specific systems. In other words, the medication does not cure the disorder, but sometimes they have symptoms that might be helped by the medication and this comprehensive approach under some circumstances is possible to achieve on an out-patient basis. In other circumstances, it requires a residential facility to be able to pull together the different components." pp. 38-39.

The psychiatrist recognized that the student had problems and would seek to avoid school because it was extremely painful for him to be there as a result of his recognition he was different from other students and could not do what other students could. He did not think the student could be cared for by living at home, having a therapist, and attending school because "the circumstances are not just right". His reasoning for the county school system not being appropriate was stated as follows:

"A. It is correct to say that I determined that this child needed to be in a residential treatment center for his psychiatric condition.

"Q. Is that then by exclusion that [the] County School System could not provide an appropriate program for this child?

"A. No. Let me explain my thinking. It really doesn't matter how wonderful [the] County schools are, what my evaluation addresses is what does this youngster need for his psychiatric condition.

"He needs to be in a residential treatment facility, and it really doesn't matter -- [the] County could have a fantastic school program, but what this child needs is to be in a residential treatment facility for his psychiatric condition.

The doctor essentially said that he didn't know what circumstances had caused this student not to be treatable at home but, based on the history, because it hadn't worked at home in the past, he didn't think it could work at home in the future. It appeared his testimony was about psychiatric treatment.

The next witness was an educator at MTMHI who had attended the IEP Team meeting in February. She testified that MTMHI had very little experience with patients with Asperger's and the staff there was not equipped to handle that diagnosis. The educator believed this student needed long-term treatment for that "specific handicap, for that specific diagnosis." The witness testified she had no knowledge as to whether the County school system had any individuals trained in Asperger's disorders and essentially said she did not believe any program would work because the student would not attend classes.

The next witness was a former social worker at MTMHI and also an attendee at the February IEP Team meeting. She testified that the proposed residential placement was appropriate for getting the student to school because they were trained in dealing with the particular disorder but that the school system's proposal to go to the home and bring the student to school was not acceptable. She later testified that she did not know whether the school system had staff trained to deal with Asperger's although she assumed not.

The mother testified about her problems with the student and that she had felt threatened and called 911 many times. The mother testified she had known for a long time that the student needed to be in some kind of residential program. At the February M-Team meeting it was obvious no agreement was going to be reached and the meeting just fell apart. This had been a first IEP Team meeting with this system because her son had never attended this system. The mother had been advised prior to the IEP meeting of the school's intention for placement of the student within the school system. She had been told by a system teacher the placement was not a good one and the teacher had been one whose opinion carried much weight with the mother. The mother testified the student could hold it together at school where there was structure but at home, especially on holiday breaks such as Christmas, the student did not handle it emotionally.

The County school system psychologist testified that since completing his Ph.D. and performing an internship, he had completed

a training program for the treatment and research with autism spectrum disorders relating to children with Pervasive Developmental Disorders. He had been trained to teach that program to teachers. He had training and experience relating to Asperger's Syndrome and was board certified as a disability analyst. He testified the school system was serving two other children with that Syndrome diagnosis. He had reviewed the student's previous educational records, met with the parent and the student, had discussed the matter with the school system's special education department, with his supervisor, and had prepared to offer a program for the student beginning in the 1998 school year. He was familiar with children such as this who had multiple hospitalizations which had occurred more often in recent years because of managed care and often resulted in in-patient psychiatric programs and short-term residential programs a number of times before the person would be released back into the community. He had maintained contact with the mother from the beginning of the 1998-1999 school year and the staff at the offered program had remained anxious to know when the student would be there at their system school. Prior to the IEP meeting, he had the distinct impression from contacts by counsel for Premier that the decision had been made for placement of the student at the residential program and the only issue was whether the school system would agree to pay for a portion of those costs. Some of the information on the IEP at the time of the Due Process hearing had not been there at the IEP Team meeting.

The supervisor of special education for the County school system testified she had been involved with students with a diagnosis of Asperger's and other students with characteristics similar and was of the opinion no one program could be provided for all persons with diagnosis of those characteristics. She had worked with another school system involving the development of a program to deal with these types of cases. The model used by the County school system in the proposed program had been adapted for children with an Asperger's diagnosis. The school system was currently serving two children with that diagnosis and two or three other children who could possibly be so diagnosed. The two children with the diagnosis had been in the school system eight and nine years. She testified that the system had trained staff available to provide different kinds of unique interventions for the students as might be needed.

The supervisor of special education also testified as to a number of other services which could be available, and could have been considered at an IEP meeting, but were not. The witness did acknowledge on cross-examination that this was her sixth year in the school system and she was not aware of any residential placements of a student by the school system during that time.

The next witness had been in the City school system for approximately nineteen years and testified that until approximately six years before, the City and County school systems had been served by the same office. Her work in special education had

covered some twenty-five years and she was familiar with Asperger's professionally and personally. She had attended in-service training and workshops and had visiting professionals at the school system because of an interest in the method that was being used with the children there. In addition to her training she had grown up with a sister who had Asperger's diagnosis and had attended various workshops. She had known the student in this case since age four and had worked with the student and mother from that time. This witness testified she believed the student had been a victim of insurance, believing that every decision had been based on insurance and some criteria unknown to her. She knew he had fifteen different case managers. She testified the school system was the best place to deal with this student's need and was concerned because of the amounts of money that had been spent on various placements without ever contacting the school system that had the most information and involvement with the student. She was the teacher who advised the mother she did not believe the proposed placement would be good but that statement had been based on only one visit at a time when the program was for at risk and behaviorally resistant children. She had since learned about the self-contained classroom proposed for this student and she would ask the mother to allow the placement.

Exhibit 5 is the "proposed" IEP from the February 18, 1999 meeting. It does list student's strengths, parent concerns/considerations, and provides that the student's involvement in the general curriculum will be minimal initially

with expansion over time. The document does note "a severe deficit in social skills and his accompanying moods/behaviors" and describes various levels of performance and objectives. The proposed IEP provides for maximum special education time as a method of transition from MTMHI to a special education program in a self-contained classroom in the County program. The proposed IEP does indicate the student will require special transportation.

Exhibit 7 is the deposition of a clinical psychologist, the clinical coordinator of the Devereux program in Malvern, Pennsylvania. The student was difficult in getting into the program but had begun on June 18, 1999. The school had a capacity of 1,000 residential clients and 25 day students all between the ages of 14 and 21 but at that time, the summer, they were only serving approximately 75. The students had diverse psychiatric diagnoses. There were no regular education kids in classes with students there. The majority of the group classes this student was in at that time consisted of this student, 3 others with Asperger's Disorder, one with major depression, one with bipolar disorder, ADHD, and 2 others with psychotic disorder, NOS. "Often a lot of our kids go into various crises or need additional support" (page 16). The behaviors and responses displayed by the clients varied greatly with some "highly explosive" and involving "major verbal abusive outbursts or destruction of property." He testified that he thought this student would be there for a minimum of 6 months and that follow-up care would be dependent upon working with the mother and agencies in Tennessee with which he would not be

familiar because this was the only client coming from Tennessee, most of the clients coming from Pennsylvania and adjoining states. The student was in 10th grade classes in the school at this program.

Exhibit 10 is identified as records from MTMHI. The first page appears to be the certification of eligibility for special education, dated September 10, 1998, and lists a series of relevant behaviors which were considered, including "good attendance". The documents indicate the admission at MTMHI was the second admission and had begun on August 11, 1998. The admissions status listed is a voluntary hospitalization (T.C.A. § 33-6-101). Exhibit 11 is the IEP prepared at MTMHI on September 10, 1998 for academic year 1998-1999. It notes strengths of "good reader; cooperative in class". It was also noted that the parent did not attend the IEP meeting. The IEP is agreed to by all members present and provides for 25 hours weekly of regular education and 7.5 hours weekly of special education.

Discussion

There certainly are no guarantees how well any program would work for this student; however, the evidence tends to show that collaborative efforts between the parent, the school system, Premier, if appropriate, and any other resources that might be necessary and available locally, could provide more opportunity for success for the student long term than placement in a residential treatment program far away and away from any education, and

probably association, with children without disabilities. The evidence indicated the student had been improving in his relationship with his mother, his most significant problem, and he wanted to go home, attend school and earn his diploma. However, the determinative question is whether the school system offered the student FAPE.

The parent is not entitled to reimbursement for the cost of the private placement in this case if FAPE (Free Appropriate Public Education) was made available for the student by the county school system. Under Board of Education v. V. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the test is to determine whether the IDEA procedures were followed and, also, whether the proposed IEP was "reasonably calculated to enable the child to receive educational benefits". 458 U.S. at 206, 207. "Procedural flaws do not automatically require a finding of a denial of a [FAPE]. However, procedural inadequacies that result in the loss of educational opportunities . . . clearly result in the denial of a [FAPE]." W.G. v. Board of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992).

Title 20, U.S.C. §1412(10) and (10)(c) and Federal regulations, 34 CFR 300.400-457 set forth the requirements of a local school district to pay for special education of children at private schools or other facilities. The State school systems have the responsibility for providing special education and related services at no cost when the child with a disability is placed in, or referred to, a private school or facility by the public agency.

The local education authority is not required to pay for the cost of special education and related services for a child with a disability at a private school or facility if the agency made FAPE available to the child and a parent elected to place the child in the private school or facility. Section 300.403(a). Any disagreements about FAPE are subject to due process and reimbursement is available to the parent if it is found that FAPE was not made available and that the private placement is appropriate. 300.403(b) and (c).

The case of Tucker v. Calloway County Board of Education, 136 F.3d 495 (6th Cir. 1998) shares some similarities with the instant case. In Tucker the parents sought reimbursement from a Kentucky school system for the cost of a Boston private school where the parents had voluntarily and unilaterally chosen to enroll the student. In Tucker the child was also diagnosed with the condition known as Pervasive Developmental Disorder. A parent contacted the school system advising the student would be attending school in Boston for a year and wanted to know whether the local public school system would pay the expenses. The school system declined and at an IEP Team type meeting it became clear the school system was only offering placement in the local school and the parent would only accept placement at the Boston school. The Court noted the 1997 amendments to IDEA providing that local school districts have no obligation to pay the cost of private education unless FAPE was not made available by the school district. However, that case was not decided upon the amendments. The Court found no error in

the previous determinations that the parent made the decision to place the student at the private school before a new IEP could be developed. Placement offered by the school district the year of concern was in a self-contained unit with ten other students, two of whom were autistic, and the teacher was certified in special education with years of experience. Testimony was that most children with PDD are educated in the public school setting. The failure of the parents to cooperate with the local school officials had prevented the creation of an IEP for the first year. It was held that the school district was not liable for the expenses associated with the private school.

Also, in Wilson County School System v. Clifton, 32 IDELR 34, No. C.A. M1999-00359-COA-R3-CV, (Tenn. App., Middle District, March 16, 2000) the Tennessee Court of Appeals addressed the issue of determining whether the school district's proposed IEP was appropriate and whether the parent was entitled to reimbursement for placement of the student at a private school. The Court outlined the purposes and requirements of the Individuals with Disabilities Education Act (IDEA) and discussed the application of law to the facts presented in that case. In that case the parent and education witnesses testified as to their personal observations, knowledge, and specific reasons why the proposed IEP was not appropriate, including the physical classroom and the lack of training and experience of the person or persons to provide the education to the student. The appellate court upheld the determination by an Administrative Law Judge and trial court that

the parent was entitled to reimbursement because the parent had met its burden of proving the proposed IEP was not appropriate and that the private school placement was appropriate. The standard for determining the appropriateness of a proposed IEP was whether the procedural requirements had been met, and whether the IEP was reasonably calculated to enable the student to receive educational benefits even if not the best possible education.

In the case under consideration the testimony offered at the Due Process Hearing, and the transcript of the IEP Team meeting, support the conclusion, as in Tucker, supra. that the IEP meeting was not used to develop an individual educational plan for the student for the tenth grade but, instead, was only to confirm that the school system would not approve the residential placement intended by the parent and Premier and set the stage for the Due Process Hearing seeking reimbursement for the cost of the private placement. There is no indication the parent, Premier, or personnel at MTMHI worked with the school system in developing the IEP for the student in the ninth grade or engaged in any meaningful communication with the school system regarding the availability of an educational program, including related services, at the local school system during the time the student was in the residential program at MTMHI or in the partial program and residing at home, or what the school had available for the student. There is no indication that the mother was familiar with the proposed program except that a former teacher had advised her the placement was not desirable. That former teacher did testify at the Due Process

Hearing that she has since investigated the placement and thought it would be the most appropriate placement and program for the student. Premier and MTMHI appear to have had no knowledge of the proposed program at the County school system. The proof in the instant case is much different from that presented in Wilson County School System v. Clifton, supra.

The procedural requirements for developing an IEP were substantially complied with in this case. When an IEP meeting was requested, and scheduled, and the school learned the mother was not aware of the IEP Team meeting, the date for the meeting was rescheduled. At the meeting the mother and participants the mother apparently selected to attend the meeting were present along with representatives from the school system. The IEP Team meeting was not a collaborative effort directed at developing an individual program to educate this student. It is clear that the school system had a plan to educate the student in the local school system and that the others in attendance planned for the student not to attend the local school system. The parent reportedly was advised of, and has known and exercised, all of her rights relating to review of the IEP Team decision. The complaint by the parent at the Due Process Hearing that the school system did not consider the educational evaluation of the forensic psychiatrist is not shown in the record. The evidence clearly shows that the evaluation was made available to the school system and the psychiatrist was present at the IEP Team meeting and participated in the discussion. The fact that the school system does not accept the recommendation

does not mean that it was not considered. Any procedural inadequacies in this case would not have resulted in a denial of FAPE.

The question as to whether the proposed IEP would provide a Free Appropriate Public Education to the student was not addressed in detail except as to the parent's contention that no program would be appropriate because the student would not attend. The parent did contend that the school system had shown no special training or expertise in dealing with Asperger's, that the proposed program presented no higher likelihood of success than numerous previous placements, and that it did not provide coordinated expertise for all hours of the day. The proposed IEP did not provide the details of a transportation program, or other program, to ensure, or attempt to ensure, the attendance of the student at school; however, it did note that transportation would be necessary. The evidence did establish that personnel in the school system had special training and expertise enabling them to serve this student with a diagnosis of Asperger's. The student has never been enrolled in this school system and the only opportunity this school system has had to serve this student is the attempt to develop an IEP at the IEP Team meeting in February of 1999. It appears from the testimony at the Due Process Hearing that the educational program would be appropriate if the student would attend and that the feared problem would be the conflict between the mother and student at home. The mother stated at the IEP Team meeting that the conditions between she and the student had been

improving and that the student wanted to attend school and get his diploma. The school system appeared to be ready, willing, and able to provide FAPE and were not given the opportunity. None of the proponents of the residential placement were familiar with the program offered at the local school system or with any of the training and experience of the educators who would be involved with this student.

If it were necessary to consider whether the Devereaux placement was appropriate, it would require a determination whether a fulltime residential placement was "necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process." Tennessee Department of Mental Health and Mental Retardation v. Paul B., 88 F.3rd 1466, 1471 (1996), and authorities cited therein. A parent would be entitled to reimbursement only if the residential placement was necessary for educational purposes. Educational purposes can be very broad. See Brown v. Wilson County School Board, 747 F.Supp. 436 (M.D. Tenn. 1990). Although there is testimony this student has experienced attendance problems, there is also evidence that his problems (to some unidentified degree) may be related to the various movements and placements by the mother and/or behavior management organization over the past few years. With the mother's statement that the relationship between she and the student had been improving and the availability of trained and experienced educational providers with a program for students with this specific diagnosis available at the local school, the proof does

not establish that school attendance makes the residential placement necessary for educational purposes. This is especially true in light of the psychiatrist's testimony the placement was to treat the psychiatric condition and the doctor did not make an educational evaluation and/or placement recommendation. The mother noted the student could hold it together at school.

Burden of Proof

The burden of proof has not controlled the outcome of this Final Order. All of the evidence has been weighed and the decisions have been made by the preponderance of evidence. However, if burden of proof was a determinative factor, the burden would be placed on the parent. This is believed to be in compliance with the controlling authorities. See, for example, Dong v. Board of Education, 197 F.3rd 793 (6th Cir. 1999); Render v. Board of Education, 1985 F.3rd 635, 642 (6th Cir. 1999); Wilson County School System v. Clifton, 32 IDELR 34, No. C.A.M1999-00359-COA-R3-CV (Tenn. App., Middle District, March 16, 2000). This may be contrary to at least one court in another circuit which held the burden is upon the school district, at least when it involves an initial IEP. Brian S. v. Vance, 32 IDELR 69 (U.S.D.C., Maryland, No. Civ, PJM 99-15, March 15, 2000).

Standing/Party in Interest

The school system initially sought dismissal of the request for due process upon the grounds the real party in interest was not

the parent or student. The facts in this case do call for consideration of this issue. At least two insurance companies have tried unsuccessfully to sue school districts to recover the benefits they had paid out for related services provided as a part of a Free Appropriate Public Education. See Gehman v. Prudential Property, 709 F.Supp. 1192 (E.D. PA 1989); Allstate v. Bethlehem Area School District, 678 F.Supp. 1132 (E.D. PA 1987). One suit was a direct suit against the school system and the other was a third-party action in a suit initiated against the insurance company. In both cases the ruling was that the student, not an insurance company, had standing to sue under the Educational Act. The school system continues to seek dismissal on the basis of these cases, contending that the real party in interest is the provider, not the student. The counsel for the parent contends that this is no different from a rich uncle or other relative making an educational loan for the benefit of the student. It seems to the Administrative Law Judge more in the nature of a subrogation claim which would not be unusual in an insurance type setting. Although concerning, the situation presented in the instant case may be legally, and technically, different from a third-party action and/or a direct suit against the school system. Also, at the time the case was being assigned to the Administrative Law Judge, the State Department of Education considered the question before assigning the case for Due Process Hearing. The undersigned declines to dismiss the Request for Due Process Hearing upon the facts present in this case.

Findings and Conclusions

1. The student is eligible for special eduction services under IDEA.

2. The IEP Team meeting February 18, 1999 was not used to, and did not, serve as a collaborative effort to determine an individual educational program and/or placement for this student.

3. The determination had been made by the parent and Premier prior to the IEP Team meeting that the student would be placed in the Devereaux Program, or similar program, and because the school system had declined to agree to pay a portion of those expenses the M-Team meeting was necessary so that a Due Process Hearing could be requested seeking reimbursement for the cost of the residential placement.

4. The school system had made the determination prior to the IEP Team meeting that an educational program for the student could be provided at a local school facility and, therefore, the local school system was not considering a residential placement.

5. A free appropriate public education was available for the student at the county school facilities.

6. The student was not placed in, or referred to, Devereaux or other residential placement by the school system.

7. The residential placement at Devereaux was not necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process.

8. The parent is not entitled to reimbursement for the placement at Devereaux.

Conclusion

It is, hereby, ORDERED that the parent is not entitled to reimbursement of the cost for placement of the student at Devereaux.

Enter this 6th day of September, 2000.

JACK E. SEAMAN
ADMINISTRATIVE LAW JUDGE
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. #4058

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order in non-reimbursement cases or three (3) years in cases involving education costs and expenses. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this Order (or thirty [30] days if the Board of Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provision of this Order.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by facsimile transmission and by U. S. Mail, postage prepaid, to the following on this 6th day of September, 2000:

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JACK E. SEAMAN

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Nashville, Tennessee 37243-0380

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	
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	)	DUE PROCESS HEARING

AMENDED FINAL ORDER

Jack E. Seaman
Administrative Law Judge
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. No. 4058
September 20, 2000

AMENDED FINAL ORDER

This Amended Final Order is issued after reconsideration by the undersigned Administrative Law Judge of the provisions of the Notice attached at page 27 of the original Final Order stating the time in which any appeal of a Final Order must be initiated. The Notice attached hereto and made a part of this Amended Final Order states the correct time in which review or appeal must be sought.

This case was initiated by a Due Process Hearing Request subsequent to an IEP Team meeting on February 18, 1999. The IEP Team consisted of ten individuals - five representatives from the County school system, two from a State mental health facility, one from the behavioral health organization responsible for the student's mental health services, a psychiatrist hired by the BHO to evaluate the student and make recommendations, and the single mother.[1] Also in attendance was a court reporter who made a stenographic recording of the meeting.

Issue

The main issue for determination is whether the parent is entitled to reimbursement from the school system for costs related to the placement of the student at the Devereaux Program in

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[1]The State mental health facility is Middle Tennessee Mental Health Institute, Tennessee Department of Mental Health and Mental Retardation, hereinafter referred to as MTMHI. The behavioral health organization is Premier Behavioral Health (Premier Behavioral Systems of Tennessee, LLC) hereinafter "Premier" which is the TennCare BHO responsible for this student's mental health services.

Pennsylvania. The student was placed at the Devereaux Program by the parent, without recommendation or referral by the school system, under a contract with Premier to pay for the placement and the parent to pursue the Due Process remedy seeking reimbursement which would be paid to Premier.

Also considered is whether the party seeking the Due process Hearing had standing to make the request.

Background

The student in this case was born in February of 1983 and began receiving special education services in preschool at age four. In grades Kindergarten through eight the student was enrolled in the City special school district schools, performed reasonably well academically, but had been absent for varying periods beginning mid-fifth grade as a result of some eighteen hospitalizations or admissions initiated by the parent typically because of acute depression, anger, violence and suicidal ideations. The student was eligible to attend the County school system in the ninth grade, school year 1998-1999, but never attended any County system school. The student was admitted, for the second time, to MTMHI on August 11, 1998 and had been discharged mid-June, 1999 to begin the placement at Devereaux in Pennsylvania. The student had varying diagnoses over the years, mostly in the pervasive development disorder area, and his current diagnosis was Asperger's Syndrome. Manifestation of this syndrome

includes difficulty with peer interaction. It is sometimes referred to as a mild form of autism.

In 1997 the student, by his mother, and the mother individually, filed a civil suit in State court against Premier and First Hospital Corporation. The allegations in the suit are unknown to the Administrative Law Judge. The information regarding the suit was made known in this Due Process proceeding because legal representation provided the parent in the Due Process proceeding is by an attorney in the same law firm providing representation for Premier in the suit by the parent and on behalf of the student against Premier. Also, the question has been presented as to whether Premier is the real party in interest in this proceeding.

Premier selected and paid a child psychiatrist at Vanderbilt University to perform a psychiatric evaluation of the student which was performed on November 5, 1998. The report was revised in December of 1998. It notes the student has "limited insight into his condition" and realizes that he does not relate as easily as others to his peers and considers that "a big problem". The report also notes the student "feels a solution is to return home and live with his mother, even though he and his mother had a very difficult relationship." The report concludes with recommending the student be placed in a residential program like Devereaux.

In January 1999, the attorney for Premier contacted the County school system to advise them of the residential placement

recommendation by the psychiatrist and to request the County school system to pay a portion of the placement cost. The report of the psychiatrist was provided the school system and the school system declined the request on behalf of Premier for contribution. Counsel for Premier then requested the IEP Team meeting which was held on February 18, 1999. It is apparent that prior to the IEP Team meeting the school concluded it would offer a program at the local school facility and not agree to the Devereaux residential placement and, also, that a determination was made by or for the mother that the student would be placed at the Devereaux Program in Pennsylvania. Following the IEP Team meeting where no consensus was reached, the mother and Premier entered into a contract whereby Premier would pay for the Devereaux placement and the mother would pursue the Due Process proceedings with counsel selected by Premier and at the direction of Premier in an effort to obtain reimbursement which would be paid to Premier.

The IEP Team Meeting February 18, 1999

The transcript of the February 18, 1999 IEP Team meeting discloses it began with courteous discussion about the student and his problems. The mother stated it was discouraging to her "because you know I'd love [for the student to be] at home going to [the local school district]." The mother stated the student and she continued to have a "more harmonious relationship" and she thought he was "developing and learning to express feelings, needs, etc." and he wasn't as explosive and violent or as threatening to

her anymore. An MTMHI representative said they had been recommending a residential placement for a long time. The psychiatrist said the problem which required residential placement was that the conflict between the student and his mother would derail him if he went home. The mother stated her son had been talking to her about a G.E.D. but had said he did not want a G.E.D.: "No. I want my diploma. I want to go through the whole thing, and I want my diploma."

About halfway through the IEP Team meeting the MTMHI school director for the in-patient program remarked that the school personnel were talking about a day program for the student when the clinical recommendation was for a residential specific disorder treatment program and commented that "We're not going to get anywhere" unless they were all considering a residential program. The school system indicated they were only addressing the educational issue and that there had been communication with the attorney for Premier which led to the statement by the representative of Premier that Premier would provide whatever was appropriate at a day program and living at home or in a residential placement but "we would certainly support the recommendation that Middle has and [the psychiatrist] has of a residential educational placement." This was even though the psychiatrist had not made a recommendation of an educational placement. An MTMHI representative addressed Premier asking what it would take for them to pay for the residential placement. Thereafter, it developed through conversation and input by the Premier representative, the

psychiatrist Premier had do the evaluation of the student, and from MTMHI representatives that the student had been accepted at the Devereux program in Pennsylvania and Premier was trying to determine if the school system would pay a portion of the cost. The school offered to go over the "shell of the IEP" that had been written to that point and talk about what they would try to offer, take input from the group, etc., but stated the school IEP Team would not agree to a residential placement. Nothing further was done with the shell IEP and no one signed it during the meeting.

The Due Process Hearing

The testimony of some of the witnesses and exhibits will be summarized. There were other witnesses and numerous exhibits introduced at the hearing and all of them were considered.

The psychiatrist testified he had been asked to see this student as a consultant to his insurance company to do psychiatric evaluation and make recommendations for treatment. His report states "In order to make recommendations regarding level of care, I have reviewed the provider manual of Premier Behavioral Systems of Tennessee." His evaluation included a two hour meeting with the mother, a one and one-half hour meeting with the student, a two minute observation of the student with peers at MTMHI, a review of previous admission records, no review of any educational materials or any proposed school program and no review or discussion with any educational officials. The doctor was familiar with some twenty admissions to two different programs from 1993 until the present

time, mostly acute hospitalizations and one residential treatment program. Most of the admissions were for depressive illness or a conduct disorder usually called PDD, Pervasive Developmental Disorder, which includes Asperger's.

When the doctor was asked what you did for a child with Asperger's, his reply was

> "Children like this need a comprehensive treatment approach and it needs to be comprehensive in the sense that the child's experience at home needs to be coordinated with school and with other activities that he may have during the day.
>
> "There usually needs to be a therapist involved who can help coordinate what happens in these different areas. . . .
>
> "Sometimes children like this need medication for specific systems. In other words, the medication does not cure the disorder, but sometimes they have symptoms that might be helped by the medication and this comprehensive approach under some circumstances is possible to achieve on an out-patient basis. In other circumstances, it requires a residential facility to be able to pull together the different components."

The psychiatrist recognized that the student had problems and would seek to avoid school because it was extremely painful for him to be there as a result of his recognition he was different from other students and could not do what other students could. He did not think the student could be cared for by living at home, having a therapist, and attending school because "the circumstances are not just right". His reasoning for the county school system not being appropriate was stated as follows:

> "A. It is correct to say that I determined that this child needed to be in a residential treatment center for his psychiatric condition.
>
> "Q. Is that then by exclusion that [the] County School System could not provide an appropriate program for this child?
>
> "A. No. Let me explain my thinking. It really doesn't matter how wonderful [the] County schools are, what my evaluation addresses is what does this youngster need for his psychiatric condition.
>
> "He needs to be in a residential treatment facility, and it really doesn't matter -- [the] County could have a fantastic school program, but what this child needs is to be in a residential treatment facility for his psychiatric condition.

The doctor essentially said that he didn't know what circumstances had caused this student not to be treatable at home but, based on the history, because it hadn't worked at home in the past, he didn't think it could work at home in the future. It appeared his testimony was about psychiatric treatment.

The next witness was an educator at MTMHI who had attended the IEP Team meeting in February. She testified that MTMHI had very little experience with patients with Asperger's and the staff there was not equipped to handle that diagnosis. The educator believed this student needed long-term treatment for that "specific handicap, for that specific diagnosis." The witness testified she had no knowledge as to whether the County school system had any individuals trained in Asperger's disorders and essentially said

she did not believe any program would work because the student would not attend classes.

The next witness was a former social worker at MTMHI and also an attendee at the February IEP Team meeting. She testified that the proposed residential placement was appropriate for getting the student to school because they were trained in dealing with the particular disorder but that the school system's proposal to go to the home and bring the student to school was not acceptable. She later testified that she did not know whether the school system had staff trained to deal with Asperger's although she assumed not.

The mother testified about her problems with the student and that she had felt threatened and called 911 many times. The mother testified she had known for a long time that the student needed to be in some kind of residential program. At the February M-Team meeting it was obvious no agreement was going to be reached and the meeting just fell apart. This had been a first IEP Team meeting with this system because her son had never attended this system. The mother had been advised prior to the IEP meeting of the school's intention for placement of the student within the school system. She had been told by a system teacher the placement was not a good one and the teacher had been one whose opinion carried much weight with the mother. The mother testified the student could hold it together at school where there was structure but at home, especially on holiday breaks such as Christmas, the student did not handle it emotionally.

The County school system psychologist testified that since completing his Ph.D. and performing an internship, he had completed a training program for the treatment and research with autism spectrum disorders relating to children with Pervasive Developmental Disorders. He had been trained to teach that program to teachers. He had training and experience relating to Asperger's Syndrome and was board certified as a disability analyst. He testified the school system was serving two other children with that Syndrome diagnosis. He had reviewed the student's previous educational records, met with the parent and the student, had discussed the matter with the school system's special education department, with his supervisor, and had prepared to offer a program for the student beginning in the 1998 school year. He was familiar with children such as this who had multiple hospitalizations which had occurred more often in recent years because of managed care and often resulted in in-patient psychiatric programs and short-term residential programs a number of times before the person would be released back into the community. He had maintained contact with the mother from the beginning of the 1998-1999 school year and the staff at the offered program had remained anxious to know when the student would be there at their system school. Prior to the IEP meeting, he had the distinct impression from contacts by counsel for Premier that the decision had been made for placement of the student at the residential program and the only issue was whether the school system would agree to pay for a portion of those costs. Some of

the information on the IEP at the time of the Due Process hearing had not been there at the IEP Team meeting.

The supervisor of special education for the County school system testified she had been involved with students with a diagnosis of Asperger's and other students with similar characteristics. She was of the opinion no one program could be provided for all persons with diagnosis of those characteristics. She had worked with another school system involving the development of a program to deal with these types of cases. The model used by the County school system in the proposed program had been adapted for children with an Asperger's diagnosis. The school system was currently serving two children with that diagnosis and two or three other children who could possibly be so diagnosed. The two children with the diagnosis had been in the school system eight and nine years. She testified the system had trained staff available to provide different kinds of unique interventions for the students as might be needed.

The supervisor of special education also testified as to a number of other services which could be available, and could have been considered at an IEP meeting, but were not. The witness did acknowledge on cross-examination that this was her sixth year in the school system and she was not aware of any residential placement of a student by the school system during that time.

The next witness had been in the City school system for approximately nineteen years and testified that until approximately

six years earlier the City and County school systems had been served by the same office. Her work in special education had covered some twenty-five years and she was familiar with Asperger's professionally and personally. She had attended in-service training and workshops and had visiting professionals at the school system because of an interest in the method that was being used with the children there. In addition to her training she had grown up with a sister who had Asperger's diagnosis and had attended various workshops. She had known the student in this case since age four and had worked with the student and mother from that time. This witness testified she believed the student had been a victim of insurance, believing that every decision had been based on insurance and some criteria unknown to her. She knew he had fifteen different case managers. She testified the school system was the best place to deal with this student's needs and was concerned because of the amounts of money that had been spent on various placements without ever contacting the school system that had the most information and involvement with the student. She was the teacher who advised the mother she did not believe the proposed placement would be good but that statement had been based on only one visit at a time when the program was for at risk and behaviorally resistant children. She had since learned about the self-contained classroom proposed for this student and she would ask the mother to allow the placement.

Exhibit 5 is the "proposed" IEP from the February 18, 1999 meeting. It does list student's strengths, parent

concerns/considerations, and provides that the student's involvement in the general curriculum will be minimal initially with expansion over time. The document does note "a severe deficit in social skills and his accompanying moods/behaviors" and describes various levels of performance and objectives. The proposed IEP provides for maximum special education time as a method of transition from MTMHI to a special education program in a self-contained classroom in the County program. The proposed IEP does indicate the student will require special transportation.

Exhibit 7 is the deposition of a clinical psychologist, the clinical coordinator of the Devereux program in Malvern, Pennsylvania. He testified the student had been difficult getting into the program but had begun on June 18, 1999. The school had a capacity of 1,000 residential clients and 25 day students all between the ages of 14 and 21 but at that time, the summer, they were only serving approximately 75. The students had diverse psychiatric diagnoses. There were no regular education kids in classes with students there. The majority of the group classes this student was in at that time consisted of this student, 3 others with Asperger's Disorder, one with major depression, one with bipolar disorder, ADHD, and 2 others with psychotic disorder, NOS. "Often a lot of our kids go into various crises or need additional support". The behaviors and responses displayed by the clients varied greatly with some "highly explosive" and involving "major verbal abusive outbursts or destruction of property." He testified he thought this student would be there for a minimum of

6 months and that follow-up care would be dependent upon working with the mother and agencies in Tennessee with which he would not be familiar because this was the only client coming from Tennessee, most of the clients coming from Pennsylvania and adjoining states. The student was in 10th grade classes in the school at this program.

Exhibit 10 is identified as records from MTMHI. The first page appears to be the certification of eligibility for special education, dated September 10, 1998, and lists a series of relevant behaviors which were considered, including "good attendance". The documents indicate the admission at MTMHI was the second admission and had begun on August 11, 1998. The admissions status listed is a voluntary hospitalization (T.C.A. § 33-6-101). Exhibit 11 is the IEP prepared at MTMHI on September 10, 1998 for academic year 1998-1999. It notes strengths of "good reader; cooperative in class". It was also noted that the parent did not attend the IEP meeting. The IEP is agreed to by all members present and provides for 25 hours weekly of regular education and 7.5 hours weekly of special education.

Discussion

There certainly are no guarantees how well any program would work for this student; however, the evidence tends to show that collaborative efforts between the parent, the school system, Premier, if appropriate, and any other resources that might be necessary and available locally, could provide more opportunity for

success for the student long term than placement in a residential treatment program far away and away from any education, and probably association, with children without disabilities. The evidence indicated the student had been improving in his relationship with his mother, his most significant problem, and he wanted to go home, attend school and earn his diploma. However, it must be determined whether the school system offered the student FAPE.

The parent is not entitled to reimbursement for the cost of the private placement in this case if FAPE (Free Appropriate Public Education) was made available for the student by the county school system. Under Board of Education v. V. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the test is to determine whether the IDEA procedures were followed and, also, whether the proposed IEP was "reasonably calculated to enable the child to receive educational benefits". 458 U.S. at 206, 207. "Procedural flaws do not automatically require a finding of a denial of a [FAPE]. However, procedural inadequacies that result in the loss of educational opportunities . . . clearly result in the denial of a [FAPE]." W.G. v. Board of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992).

Title 20, U.S.C. §1412(10) and (10)(C) and Federal regulations, 34 CFR 300.400-457 set forth the requirements of a local school district to pay for special education of children at private schools or other facilities. The State school systems have the responsibility for providing special education and related

services at no cost when the child with a disability is placed in, or referred to, a private school or facility by the public agency. The local education authority is not required to pay for the cost of special education and related services for a child with a disability at a private school or facility if the agency made FAPE available to the child and a parent elected to place the child in the private school or facility. Section 300.403(a). Any disagreements about FAPE are subject to due process and reimbursement is available to the parent if it is found that FAPE was not made available and that the private placement is appropriate. 300.403(b) and (c).

The case of Tucker v. Calloway County Board of Education, 136 F.3d 495 (6th Cir. 1998) shares some similarities with the instant case. In Tucker the parents sought reimbursement from a Kentucky school system for the cost of a Boston private school where the parents had voluntarily and unilaterally chosen to enroll the student. In Tucker the child was also diagnosed with the condition known as Pervasive Developmental Disorder. A parent contacted the school system advising the student would be attending school in Boston for a year and wanted to know whether the local public school system would pay the expenses. The school system declined and at an IEP Team type meeting it became clear the school system was only offering placement in the local school and the parent would only accept placement at the Boston school. The Court noted the 1997 amendments to IDEA providing that local school districts have no obligation to pay the cost of private education unless FAPE

was not made available by the school district. However, that case was not decided upon the amendments. The Court found no error in the previous determinations that the parent made the decision to place the student at the private school before a new IEP could be developed. Placement offered by the school district the year of concern was in a self-contained unit with ten other students, two of whom were autistic, and the teacher was certified in special education with years of experience. Testimony was that most children with PDD are educated in the public school setting. The failure of the parents to cooperate with the local school officials had prevented the creation of an IEP for the first year. It was held that the school district was not liable for the expenses associated with the private school.

Also, in Wilson County School System v. Clifton, 32 IDELR 34, No. C.A. M1999-00359-COA-R3-CV, (Tenn. App., Middle District, March 16, 2000) the Tennessee Court of Appeals addressed the issue of determining whether the school district's proposed IEP was appropriate and whether the parent was entitled to reimbursement for placement of the student at a private school. The Court outlined the purposes and requirements of the Individuals with Disabilities Education Act (IDEA) and discussed the application of law to the facts presented in that case. In that case the parent and education witnesses testified as to their personal observations, knowledge, and specific reasons why the proposed IEP was not appropriate, including the physical classroom and the lack of training and experience of the person or persons to provide the

education to the student. The appellate court upheld the determination by an Administrative Law Judge and trial court that the parent was entitled to reimbursement because the parent had met its burden of proving the proposed IEP was not appropriate and that the private school placement was appropriate. The standard for determining the appropriateness of a proposed IEP was whether the procedural requirements had been met, and whether the IEP was reasonably calculated to enable the student to receive educational benefits even if not the best possible education.

In the case under consideration the testimony offered at the Due Process Hearing, and the transcript of the IEP Team meeting, support the conclusion, as in Tucker, supra. that the IEP meeting was not used to develop an individual educational plan for the student for the tenth grade but, instead, was only to confirm that the school system would not approve the residential placement intended by the parent and Premier and set the stage for the Due Process Hearing seeking reimbursement for the cost of the private placement. There is no indication the parent, Premier, or personnel at MTMHI worked with the school system in developing the IEP for the student in the ninth grade or engaged in any meaningful communication with the school system regarding the availability of an educational program, including related services, at the local school system during the time the student was in the residential program at MTMHI or in the partial program and residing at home, or what the school had available for the student. There is no indication that the mother was familiar with the proposed program

except that a former teacher had advised her the placement was not desirable. That former teacher did testify at the Due Process Hearing that she has since investigated the placement and thought it would be the most appropriate placement and program for the student. Premier and MTMHI appear to have had no knowledge of the proposed program at the County school system. The proof in the instant case is much different from that presented in Wilson County School System v. Clifton, supra.

The procedural requirements for developing an IEP were substantially complied with in this case. When an IEP meeting was requested, and scheduled, and the school learned the mother was not aware of the IEP Team meeting, the date for the meeting was rescheduled. At the meeting the mother and participants the mother apparently selected to attend the meeting were present along with representatives from the school system. The IEP Team meeting was not a collaborative effort directed at developing an individual program to educate this student. It is clear that the school system had a plan to educate the student in the local school system and that the others in attendance planned for the student not to attend the local school system. The parent reportedly was advised of, and has known and exercised, all of her rights relating to review of the IEP Team decision. The complaint by the parent at the Due Process Hearing that the school system did not consider the educational evaluation of the forensic psychiatrist is not shown in the record. The evidence clearly shows that the evaluation was made available to the school system and the psychiatrist was

present at the IEP Team meeting and participated in the discussion. The fact that the school system does not accept the recommendation does not mean that it was not considered. Any procedural inadequacies in this case would not have resulted in a denial of FAPE.

The question as to whether the proposed IEP would provide a Free Appropriate Public Education to the student was not addressed in detail except as to the parent's contention that no program would be appropriate because the student would not attend. The parent did contend that the school system had shown no special training or expertise in dealing with Asperger's, that the proposed program presented no higher likelihood of success than numerous previous placements, and that it did not provide coordinated expertise for all hours of the day. The proposed IEP did not provide the details of a transportation program, or other program, to ensure, or attempt to ensure, the attendance of the student at school; however, it did note that transportation would be necessary. The evidence did establish that personnel in the school system had special training and expertise enabling them to serve this student with a diagnosis of Asperger's. The student has never been enrolled in this school system and the only opportunity this school system has had to serve this student is the attempt to develop an IEP at the IEP Team meeting in February of 1999. It appears from the testimony at the Due Process Hearing that the educational program would be appropriate if the student would attend and that the feared problem would be the conflict between

the mother and student at home. The mother stated at the IEP Team meeting that the conditions between she and the student had been improving and that the student wanted to attend school and get his diploma. The school system appeared to be ready, willing, and able to provide FAPE and were not given the opportunity. None of the proponents of the residential placement were familiar with the program offered at the local school system or with any of the training and experience of the educators who would be involved with this student.

If it were necessary to consider whether the Devereaux placement was appropriate, it would require a determination whether a fulltime residential placement was "necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process." Tennessee Department of Mental Health and Mental Retardation v. Paul B., 88 F.3rd 1466, 1471 (1996), and authorities cited therein. A parent would be entitled to reimbursement only if the residential placement was necessary for educational purposes. Educational purposes can be very broad. See Brown v. Wilson County School Board, 747 F.Supp. 436 (M.D. Tenn. 1990). Although there is testimony this student has experienced attendance problems, there is also evidence that his problems (to some unidentified degree) may be related to the various movements and placements by the mother and/or behavior management organization over the past few years. With the mother's statement that the relationship between she and the student had been improving and the availability of trained and experienced

educational providers with a program for students with this specific diagnosis available at the local school, the proof does not establish that school attendance makes the residential placement necessary for educational purposes. This is especially true in light of the psychiatrist's testimony the placement was to treat the psychiatric condition and the doctor did not make an educational evaluation and/or placement recommendation. The mother noted the student could hold it together at school.

Burden of Proof

The burden of proof has not controlled the outcome of this Final Order. All of the evidence has been weighed and the decisions have been made by the preponderance of evidence. However, if burden of proof was a determinative factor, the burden would be placed on the parent. This is believed to be in compliance with the controlling authorities. See,for example, Dong v. Board of Education, 197 F.3rd 793 (6th Cir. 1999); Render v. Board of Education, 1985 F.3rd 635, 642 (6th Cir. 1999); Wilson County School System v. Clifton, 32 IDELR 34, No. C.A.M1999-00359-COA-R3-CV (Tenn. App., Middle District, March 16, 2000). This may be contrary to at least one court in another circuit which held the burden is upon the school district, at least when it involves an initial IEP. Brian S. v. Vance, 32 IDELR 69 (U.S.D.C., Maryland, No. Civ, PJM 99-15, March 15, 2000).

Standing/Party in Interest

The school system initially sought dismissal of the request for due process upon the grounds the real party in interest was not the parent or student. The facts in this case do call for consideration of this issue. At least two insurance companies have tried unsuccessfully to sue school districts to recover the benefits they had paid out for related services provided as a part of a Free Appropriate Public Education. See Gehman v. Prudential Property, 709 F.Supp. 1192 (E.D. PA 1989); Allstate v. Bethlehem Area School District, 678 F.Supp. 1132 (E.D. PA 1987). One suit was a direct suit against the school system and the other was a third-party action in a suit initiated against the insurance company. In both cases the ruling was that the student, not an insurance company, had standing to sue under the Educational Act. The school system continues to seek dismissal on the basis of these cases, contending that the real party in interest is the provider, not the student. The counsel for the parent contends that this is no different from a rich uncle or other relative making an educational loan for the benefit of the student. It seems to the Administrative Law Judge more in the nature of a subrogation claim which would not be unusual in an insurance type setting. Although concerning, the situation presented in the instant case may be legally, and technically, different from a third-party action and/or a direct suit against the school system. Also, at the time the case was being assigned to the Administrative Law Judge, the State Department of Education considered the question before

assigning the case for Due Process Hearing. The undersigned declines to dismiss the Request for Due Process Hearing upon the facts present in this case.

Findings and Conclusions

1. The student is eligible for special eduction services under IDEA.

2. The IEP Team meeting February 18, 1999 was not used to, and did not, serve as a collaborative effort to determine an individual educational program and/or placement for this student.

3. The determination had been made by the parent and Premier prior to the IEP Team meeting that the student would be placed in the Devereaux Program, or similar program, and because the school system had declined to agree to pay a portion of those expenses the M-Team meeting was necessary so that a Due Process Hearing could be requested seeking reimbursement for the cost of the residential placement.

4. The school system had made the determination prior to the IEP Team meeting that an educational program for the student could be provided at a local school facility and, therefore, the local school system was not considering a residential placement.

5. A free appropriate public education was available for the student at the county school facilities.

6. The student was not placed in, or referred to, Devereaux or other residential placement by the school system.

7. The residential placement at Devereaux was not necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process.

8. The parent is not entitled to reimbursement for the placement at Devereaux.

Conclusion

It is, hereby, ORDERED that the parent is not entitled to reimbursement of the cost for placement of the student at Devereaux.

Enter this 20th day of September, 2000.

JACK E. SEAMAN
ADMINISTRATIVE LAW JUDGE
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. #4058

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by facsimile transmission and by U. S. Mail, postage prepaid, to the following on this 20th day of September, 2000:

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